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512474—43

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 683

J. S. SONDOCK AND M. G. SONDOCK, INDIVIDUALLY AND AS PARTNERS DOING BUSINESS UNDER THE NAME OF MCCANE-SONDOCK DETECTIVE AGENCY, PETITIONERS

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 219–236) is reported in 43 F. Supp. 339. The opinion of the Circuit Court of Appeals (R. 241–242) is reported in 132 F. (2d) 77.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 12, 1942 (R. 243). The

petition for a writ of certiorari was filed on January 29, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether watchmen guarding plants producing goods for interstate commerce are engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act.[1]

2. Whether a company which supplies watchmen to guard industrial concerns and other places of business, as well as some private residences, is a service establishment within the meaning of Section 13 (a) (2).

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act, c. 676, 52 Stat. 1060 (29 U. S. C., sec. 201) provide as follows:

> SEC. 6 (a). Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates— * * *
>
> Sec. 7 (a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for

[1] The court below stated that employees contributing to the consummation of transactions in interstate commerce were engaged in commerce within the meaning of the Act. Petitioners, however, have not presented this question for review. (Pet. pp. 6–7, 21.)

commerce— * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Sec. 3. As used in this Act— * * * (j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

Sec. 13 (a). The provisions of sections 6 and 7 shall not apply with respect to * * * (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce * * *

STATEMENT

On June 6, 1941, the respondent brought suit (R. 6–11) to restrain petitioners from violating the provisions of the Fair Labor Standards Act, alleging that many of their employees were engaged in commerce and in the production of goods for commerce. Petitioners conceded noncompliance with the provisions of the Act but denied its applicability to their employees' work and asserted affirma-

tively that their business was exempt as a "service establishment" within the meaning of Section 13 (a) (2). (R. 24–28, 28–33.)

Petitioners employ approximately 34 night watchmen in and about Houston, Texas, to guard the premises of their customers pursuant to contracts. (R. 35, 222.) Some employees are assigned to guard industrial and commercial plants, warehouses, factories, and other establishments engaged in the production of goods for commerce or in interstate commerce, while others are detailed to watch private residences and retail and service establishments.[2] (R. 223–233, 35–75.) All watchmen are carried on petitioners' pay roll and are employed by them, but work at the customers' establishments. (R. 35.) The owners of the guarded premises pay petitioners an agreed price for the work done by the watchmen. (R. 35.)

The employees involved in the appeal below fall into two categories: those whose work requires them to make regular rounds or beats throughout the night guarding a number and diversity of business establishments, and those assigned to guard exclusively the manufacturing establishment or plant of a single customer. (R. 223–233.)

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[2] The appeal below did not involve employees in the latter category or those employees irregularly or occasionally employed by appellees for special assignments as private detectives or guards. (See Appellant's Brief in the Circuit Court of Appeals, p. 3, a copy of which has been filed with the clerk of this Court.)

Although technically under the direction of petitioners, the watchmen are actually supervised, in many instances, by petitioners' customers. Watchmen whose work is unsatisfactory to the customer are replaced upon request (R. 122, 216) and in one instance the watchman's wages and hours were prescribed by the customer (R. 216). Petitioners' customers apparently found the employment of watchmen necessary to the proper operation of their businesses. Some, before entering into contracts with petitioners, employed men on their own pay rolls to perform the same tasks. These were later employed by petitioners for the same work (R. 100–101, 122, 163–165). Other businesses, after discontinuing their contracts with petitioners have undertaken to re-employ watchmen (R. 91–92, 105–106) and have hired the man previously furnished by petitioners (R. 91–92, 138–139, 163–165).

The watchmen in many instances guard the plants of concerns engaged in the production of goods for commerce (R. 40, 41–42, 43, 43–44, 45–46, 46–47); they protect the plants and premises of their employers' customers from marauders and thieves and guard against fires. (R. 130–131, 134, 140.)

The District Court denied the Administrator's prayer for an injunction, holding that "Defendants are a service establishment, and Defendants' employees or watchmen are engaged in a service establishment" within the exemption from Sections

6 and 7 provided by Section 13 (a) (2) (R. 235–236). Because of its ruling on this issue, the District Court found it unnecessary to decide whether the watchmen are engaged in "production for commerce" within the meaning of Sections 6 and 7 of the Act (R. 234). The Circuit Court of Appeals reversed this ruling, holding that the employees were not engaged in a service establishment, and held further that the watchmen who guarded buildings and machinery used to produce goods for commerce were engaged in the production of goods for commerce within the meaning of the Act. It remanded the cause to the District Court for further proceedings not inconsistent with its opinion (R. 241–242).

ARGUMENT

The decision of the court below is correct and does not call for further review.

1. The petitioners urge that watchmen for concerns engaged in the production of goods for commerce perform services only tenuously related to production (Pet. p. 24). But in *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, this Court held that watchmen performed services necessary to production and were therefore engaged in production within the meaning of Section 3 (j). The petitioners urge a distinction between that case and the present one, in that the employer here was engaged solely in supplying watchmen (Pet. p. 23). However, as the *Kirschbaum* case held, the business of the employer is not determinative;

coverage depends upon the activities performed by the employees. See also *Warren-Bradshaw Drilling Co.* v. *Hall,* No. 21, present Term; *Walling* v. *Jacksonville Paper Co.,* No. 336, present Term; *Overstreet* v. *North Shore Corp.,* No. 284, present Term. In the *Kirschbaum* case, as here, the watchmen were not employed by one whose primary business was the production of goods for commerce. The watchmen were employed by the owner of a loft building, the tenants of which were manufacturers. The services of the watchmen as well as other employees were provided by the building owner. Disregarding the general nature of the employer's business, the Court held the services of the watchmen necessary to production. Whether the watchmen are employed by the manufacturer directly, by a landlord supplying the watchmen to the manufacturer, or by an agency engaged solely in supplying watchmen to manufacturers and others is therefore immaterial. Employees engaged in the protection of buildings from fire and theft perform services necessary to production and are within the Act's coverage. *Johnson* v. *Phillips-Buttorff Manufacturing Company,* 160 S. W. (2d) 893 (Tenn.), certiorari denied, No. 193, present Term.

2. Petitioners also urge that their business is a service establishment within the exemption provided by Section 13 (a) (2) because they are engaged exclusively in supplying the services of

watchmen to industrial and other users. The *Kirschbaum* case, in which a similar contention was advanced, also disposes of this question. The Court stated (page 526) "selling space in a loft building is not the equivalent of selling services to consumers * * *." Upon similar reasoning, as held by the court below, supplying watchmen to industrial concerns is not the equivalent of selling services to consumers. Other circuit courts of appeal have similarly considered the service establishment exemption applicable only to establishments, comparable in nature to retail organizations, which serve the general consuming public. *Fleming* v. *Arsenal Bldg. Corp.,* 125 F. (2d) 278, 280 (C. C. A. 2); *Fleming* v. *A. B. Kirschbaum Co.,* 124 F. (2d) 567, 572–573 (C. C. A. 3); *Lagerstrom* v. *Hanson* (C. C. A. 8), decided Feb. 8, 1943; *Consolidated Timber Co.* v. *Womack,* 132 F. (2d) 101 (C. C. A. 9).

3. Finally, the petitioners urge that the court below erred because it held that watchmen, whose "beats" might include only one firm engaged in production for commerce and twenty others not so engaged, were subject to the coverage of the Act. We believe this contention does not accurately characterize the decision of the court below. Its decision is in general terms and makes no attempt to frame a decree which would indicate which employees of petitioners were covered, and which were not. (R. 242.) The District Court held that petitioners' business was a service establishment and

therefore made no findings with respect to the activities of any of petitioners' employees in production for commerce. The court below held, in accordance with this Court's opinion in the *Kirschbaum* case, that the service establishment exemption did not apply and that watchmen for concerns engaged in production for commerce were themselves engaged in production for commerce. It reversed the judgment of the District Court and remanded the case for further proceedings not inconsistent with its decision. Thus, it will be the duty of the District Court to determine from the facts which employees perform the functions which the Circuit Court of Appeals held to be covered by the Act.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

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